* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on : May 3, 2007
Date of decision: May 21, 2007.

\+ W.P.(C) 18328/2004 & CMs 13865/04, 914/06, 4123/06

BHASIN MOTORS (I) P. LTD. ..... Petitioner
Through Dr. Sarbjit Sharma with
Ms. R. Veena, Advocates

versus

N.D.P.L. ..... Respondent
Through Mr. Sudhir Nandrajog with
Mr. Vishal Anand, Advocate

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

Dr. S.Muralidhar J.

1. The Petitioner had an electricity connection with the sanctioned load of 83 KW for industrial purposes installed at its premises at 56-B, Rama Road, Najafgarh Industrial Area, Delhi. It was an authorised dealer of Maruti Udyog Limited till May 2003. The Petitioner had in 2000 purchased the property with the aforementioned electricity connection. On 14.3.2001, the petitioner applied for a transfer of the connection to its name . In relation to a misuse demand from 14.7.2000 till 14.3.2001, the matter was placed before the Permanent Lok Adalat (PLA) and disposed of by it by an order dated 29.12.2003.

2. According to the Petitioner, on 11.9.2004 some officials of the Respondent North Delhi Power Limited (NDPL) visited the premises and prepared an inspection report. The inspection report concluded that the Petitioner was indulging in Dishonest Abstraction of Energy

(DAE). Thereafter, a bill for Rs.15,58,955/- was sent to the Petitioner.

3. Consequent upon the inspection report, a show cause notice was issued to the Petitioner. A personal hearing was afforded and the Petitioner also submitted a written representation. This was followed by a Speaking Order dated 30.9.2004 confirming the DAE. During the pendency of these proceedings, the Petitioner approached this Court with Writ Petition (Civil) No.17303/2004 which was disposed of on 1.11.2004. The Speaking Order dated 30.9.2004 was quashed on the ground that it had been made without affording the Petitioner an opportunity of being heard. Consequent upon the above order of this Court, the Petitioner was given a fresh hearing on 4.11.2004. Thereafter another Speaking Order dated 11.11.2004 was passed concluding that DAE was conclusively established.

4. The Petitioner filed the present writ petition on 24.11.2004 challenging the inspection report, the impugned bill as well as the speaking order dated 11.11.2004. When this writ petition was listed before this Court on 30.11.2004, while directing notice to issue to the Respondent, this Court stayed the disconnection of the Petitioner's electricity subject to the Petitioner depositing 50 per cent of the disputed bill within one week.

5. The Petitioner has assailed the speaking order on the ground that the conclusion reached therein was based entirely on the consumption pattern which according to the Petitioner is not unusual in the facts and circumstances of the case. The Petitioner points out that the Maruti Sales and Service Agency was withdrawn from it on 1.6.2003, and thereafter it took on the agency of Mahindra and

Mahindra Limited. The power consumption, therefore, dropped considerably and it was not attributable to any DAE. The Petitioner contends that if a parallel meter had been installed it would have recorded the actual consumption and would have borne out the petitioner's contention. However, the Respondent wrongly turned down the request for measuring the actual consumption through a parallel meter. According to the Petitioner, the mere fact that one of the seals of the meter was missing, was not sufficient for the Respondent to conclude that this was a case of DAE.

6. The reply filed by the NDPL states that the case of DAE there made out on comparing the assessed /computed consumption against the consumption pattern in terms of Regulation 25(iv) and Regulation 26(ii) of the Delhi Electricity Regulatory Commission (Performance Standards-Metering and Billing) Regulations, 2002 (`DERC Regulations'). Applying the LDHF Formula the average recorded consumption, as a percentage of the assessed consumption was found to be only 24.42%, i.e., much less than 75% within the meaning of Regulation 26(ii). It is accordingly submitted that no case for interference by this Court is made out.

7. Dr. Sarbjit Sharma, learned counsel appearing for the Petitioner submitted that the Speaking Order refers to the average recorded consumption for the period February 2000 to December 2002 as 20400.68 units per month and the average recorded consumption for the period 3.7.2003 to 11.9.2004 as 6022.32 units per month. He questioned this determination with reference to the actual bills received by the Petitioner which indicated a different story.

8. Mr. Sudhir Nandrajog, the learned counsel for the Respondent NDPL referred to the counter affidavit filed by it which gave the usage history from 1.6.2002 to 27.11.2004. He argued that the consumption pattern for the period prior to the Petitioner taking over the premises was much higher than the period during which the Petitioner was operating. This showed a discernible drop thereby strengthening the suspicion of DAE.

9. Since the documents produced by both the parties did not cover the entire period from February 2000 onwards, this Court by an Order dated 16.3.2007 required the parties to file additional documents that would enable verification of the figures mentioned in the Speaking Order.

10. The NDPL thereafter filed an additional affidavit in which it set out the meter reading and the units recorded for the period 4.5.1999 to 2.2.2000, 4.3.2000 to 27.12.2002 and 3.7.2003 to 11.9.2004. The affidavit states that “it is evident that the recorded consumption as recorded by the meter installed in the property in question is far less than the computed consumption arrived at in accordance with the formula prescribed under the law.”

11. The Petitioner's additional affidavit dated 19.4.2007 encloses copies of bills raised during the aforementioned periods which according to the petitioner were erroneously raised. A detailed chart had been set out for the period 1.3.2000 till 28.9.2004 to show that in fact the Petitioner ended up paying far more than what it actually should have. The petitioner, however, points out that the meter was changed in April 2002 since the earlier meter was obviously defective

and the bills also were correspondingly erroneous.

12. The first issue to be considered is whether there is conclusive evidence to show that the Petitioner was indulging in DAE. It is not in dispute that the inspection report indicates the following three features:

> "Upper Seal of meter box found tampered.
> Scratches observed on dial plate.
> Cover seals found missing."

However, as the DERC Regulations themselves acknowledge, these signs are at best, helpful to 'suspect' DAE. They cannot be taken to be 'conclusive evidence'. This Court has already explained in several decisions (***Jagdish Narayan v. NDPL*** judgment dated 18.4.2007 in W.P.(C) 10287/2005) that something more would have to be shown to enable the Court to conclude that there has been DAE.

13. The Speaking Order appears to rely entirely only upon the recorded consumption to conclude that this was a case of DAE. The condition seems to be influenced primarily by the fact that consumption prior to the Petitioner taking over the premises in February 2000, was high when compared to the period after the Petitioner took over. In the view of this Court, this factor by itself can really not mean much since the nature of the activity being carried on in the premises will determine the use pattern. According to the Petitioner, the previous owners were running a plastic factory whereas the Petitioner began by operating a Sales Service Agency of the Maruti Udyog Limited. Without enough evidence to show that there was tampering with the internal mechanism of the meter in order to slow down the meter and make it record the lesser

consumption, the mere comparison of the consumption pattern for two periods may not *ipso facto* indicate the DAE.

14. As regards the period after the Petitioner took over, i.e., from 4.3.2000 to 11.9.2004, the consumption pattern has been broken up into two distinct periods, i.e., 4.3.2000 till 27.12.2002 and 3.7.2003 till 11.9.2004. Again, comparing the recorded consumptions for these periods by itself again does not indicate much. Various reasons like seasonal use and bulk orders being undertaken, depending on the nature of the industry or the activity, may explain why there can be a variance in the consumption pattern.

15. What appears to have been happening in some of these cases is that the suspicion of the DAE is leading to the Respondent immediately to work out the assessed/computed consumption by using the LDHF formula without first conclusively establishing that there is DAE. The stage for applying the LDHF formula is after it is conclusively established that there is DAE. The LDHF formula is only for determining the quantum of penalty that is required to be levied in terms of Regulation 26(ii) of the DERC Regulations. It would be erroneous for the Respondent to begin by applying the penalty formula, comparing the recorded units with the computed units and then concluding that there is DAE on the basis of the percentage, i.e., worked out. The purpose of Regulation 26(ii) is not for determining DAE but for determining the penalty once the DAE has been established.

16. Looking at the issue from another perspective, the underlying presumption in applying the LDHF formula is that, the entire

connected load is being used for all the possible working hours and days of the factory in question without reference to the actual working hours and days. There is a danger in this because a unit may not be genuinely working for all the days and hours. Therefore, it becomes imperative for the Respondent to first determine DAE by conclusive evidence before it can apply the formula. This Court is not called upon in these proceedings to determine validity of using the penalty formula as stipulated in the DERC Regulations and so that need not be examined here.

17. In ***Jagdish Narayan v NDPL*** *(supra)* and ***Udham Singh v. BSES Rajdhani Power Ltd***. 136 (2007) DLT 500, this Court has interpreted the provisions of Section 135 of the Electricity Act, 2003 read with the DERC Regulations. The relevant passages of the last mentioned judgment in ***Jagdish Narayan*** reads as under:

> "23. What is central to the definition of theft under Section 135 of the Act, which according to the respondent covers DAE as well is the element of 'dishonesty'. Therefore the *mens rea* or the intention of the consumer to dishonestly abstract electricity must be proved "conclusively" to bring home the charge of DAE. Therefore the requirement of "conclusive evidence" in terms of Regulation 25 (iii) is consistent with the statutory mandate of Section 135 (1). That can be established only by showing that the consumer was responsible for tampering the meter by some visible means. The external manifestations of tampering, as has been found in the inspections conducted in the present cases, can only raise a suspicion of DAE. That suspicion will have to be made good by some tangible evidence of physical means of tampering before the presumption can be drawn that it was the consumer who tampered the meter.
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> 24. The decision of the Hon'ble Supreme Court in ***Jagannath Singh v. B.S. Ramaswamy*** [1966] 1 SCR 885 is illustrative although there the Court was concerned with a criminal

conviction for the offence of theft of electricity under Sections 39 and 44 of the Indian Electricity Act, 1910. The approach to the requirement of proof of dishonest abstraction of energy is nevertheless relevant for the present case. The Hon'ble Supreme Court held that the existence of artificial means for abstracting energy can only give rise to a presumption that there had been a dishonest abstraction. The supplier would still have to show that the consumer is responsible for such tampering. In the said case, it was contended that the existence of an open stud hole on the meter was sufficient proof that dishonest abstraction of energy had taken place. In answer to that contention, the Hon'ble Supreme Court observed as under:

> "A meter with an exposed stud hole, without more, is not a perfected instrument for unauthorized taking of energy, and cannot be regarded as an artificial means of its abstraction. To make it such an artificial means, the tampering must go further, and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy. To bring home the charge under Section 39, the prosecution must also prove that the consumer is responsible for the tampering. The evidence adduced by the prosecution must establish beyond doubt that the consumer is guilty of dishonest abstraction of energy."

25. Applying the above test, it has to be held that an automatic presumption of DAE on the basis of the external symptoms of tampering together with the analysis of the consumption pattern would not be a safe and error free method. Some other tangible evidence must be shown to exist. An accu check meter can be deployed to find out if the meter is in fact recording lesser units. The analysis of the consumption pattern in terms of the Regulation 26 (ii) is merely corroborative and not by itself substantive evidence of DAE. The decision of this Court in ***Udham Singh v. BSES Rajdhani Power Ltd***. 136 (2007) DLT 500 is to the same effect. In fact, the formula is applied in terms of Regulation 25 (iv) read with

26 (ii) only for determining the penalty payable by the consumer once a case of either direct theft or DAE has been made out. The penalty formula cannot itself supply the proof of DAE or theft."

18. In the instant case the inspection report could at best have only led to an suspicion of DAE which was thereafter required to be established through 'conclusive evidence'. However, apart from the computed assessment determined by using the LDHF formula, there is no material to establish DAE. In the circumstances, this Court holds that the impugned Speaking Order has clearly erred in declining the request of the Petitioner for ascertaining the consumption pattern of the meter by installing a parallel meter. DAE has, therefore, not been established in this case.

19. A faint attempt was made by Mr. Nandrajog to explain the conclusion of DAE by stating that the type of the meter which was installed in the premises of the Petitioner was not one on which a accu-check could be performed or a CNR data generated. However, it does appear that the actual consumption on that connection could be ascertained through a parallel meter. Admittedly, this was not done in the instant case. What means the Respondent should employ to conclusively establish DAE is not for the Court to suggest. All that the Court is able to say in the instant case that the evidence on record, upon which the Respondent is relying to prove DAE, can hardly be termed to be of a 'conclusive' nature. The statement in the Speaking Order: "not only the seals were found tampered but multiple irregularities were also detected by the inspection team, which were also corroborated by the comprehensive analysis of the consumption pattern" is not borne out by the record at all.

20. Mr. Nandrjaog then suggested that the Petitioner was possibly physically altering the digits of the meter so as to show a lesser consumption by setting back the reading. If that was the case, then the recording of the reading would clearly indicate that tampering of this nature had taken place. This is, however, is not the case made out by the Respondent anywhere, either in the show cause or in the speaking order or even in the pleadings filed in this Court.

21. For all the above reasons, this Court concludes that the impugned Speaking Order dated 11.11.2004 is unsustainable in law. It is hereby quashed. Consequently, the impugned bill is also quashed. The Petitioner would be entitled to the refund of the amount deposited by it, pursuant to the Order dated 30.11.2004 passed by this Court. It is directed that the amount be refunded by the Respondent to the petitioner together with interest at 12% per annum within a period of four weeks from today, and in any event not later than 20.6.2007. It is made clear that for the period of delay in making refund, beyond that date, interest at 18 per cent p.a. will be payable. The Respondent is also directed to pay the Petitioner costs of Rs. 10,000/- within a period of four weeks.

22. With the above directions, the writ petition is allowed. The applications are disposed of.

May 21, 2007 S. Muralidhar, J.
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